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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 CRUMP INSURANCE SERVICES, INC.,

12 Plaintiff,

13 v.

14 MICHAEL P. MCGRATH, an individual,
15 ALL RISKS, LTD., a corporation, and
Does 1 through 50, inclusive,

16 Defendants.
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Case No. C-07-4636 MMC

**CONSOLIDATED REPLY IN
SUPPORT OF PLAINTIFF'S
MOTIONS TO COMPEL**

Date: August 6, 2008
Time: 9:30 a.m.
CMJ: Hon. James Larson
Ctrm.: F; 15th Fl.

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MEMORANDUM OF POINTS AND AUTHORITIES**ARGUMENT****I. This court should grant Crump's first motion to compel.****A. This Court should compel All Risks to respond fully to RFP No. 4.****1. Defendants repeatedly refused Crump's requests to meet and confer, and then participated grudgingly and minimally, but now blame Crump for their own refusals.**

Crump tried repeatedly to meet and confer regarding the issues raised in its motion. Defendants responded only with repeated refusals and accusations of wrongdoing, until days before the motion deadline. Now, citing no authority, Defendants argue that Crump did not adequately meet and confer regarding RFP No. 4, which seeks documents regarding All Risks' solicitation of Crump employees. (All Risks Opp. at 7:3-8:8.) Contrary to All Risks' false assertion, Defendants have only themselves to blame for Crump's having to file this motion.

Crump asked to meet and confer over the requests that are at issue. *Declaration of Dylan B. Carp, executed June 18, 2008, Ex. D at 1* ("1st Carp Dec"). Defendants flatly refused, writing that "All Risks and McGrath have already sufficiently met and conferred with Plaintiff on these requests. *Any attempt to meet and confer further or move to compel regarding these requests at this late time would be burdensome and harassing in addition to untimely* pursuant to Federal Rule of Civil Procedure 5(d)(1)." *1st Carp Dec, Ex. E at 2* (emphasis added).

Crump asked Defendants to "reconsider your refusal to meet and confer further on any of the issues raised in our letter," as "the issue is whether or not we should assist the court by trying one last time to resolve these disputes," and "*if you simply refuse our offer to try one last time, you will be in the uncomfortable position of having to explain to the court the ground for your refusal.*" *1st Carp Dec, Ex. F at 1-2* (emphasis added).

Crump's counsel Dylan B. Carp spoke with Defendants' counsel Kristin Williams on the phone. Ms. Williams reiterated her position that she need not meet and confer further regarding the requests at issue in this motion, and promised only to get back to Mr. Carp regarding whether any disputes could be resolved on the ground that no responsive documents exist.

1 *Declaration of Dylan B. Crump, executed July 22, 2008 ("3rd Crump Dec"), ¶ 2; 1st Crump Dec, Ex.*
2 *G at 1.* Crump memorialized this conversation and reiterated that "[o]ur offer to meet and
3 confer further with you over any and all of the issues addressed in our previous letters to you
4 remains open." *1st Crump Dec, Ex. G at 1.*

5 Defendants' counsel once again wrote that "[i]t remains our assertion that Defendants
6 have already met and conferred in good faith regarding the discovery responses that you now
7 seek to meet and confer again." *1st Crump Dec, Ex. H at 2.* It was in this letter that All Risks
8 finally offered at least some type of substantive position on the requests, stating regarding RFP
9 No. 4 that the request "seeks a hopelessly wide range of documents (i.e., internal
10 communications regarding what salaries should be offered, etc.)" and "has no nexus to McGrath
11 and therefore no relation to this lawsuit." *1st Crump Dec, Ex. H at 2.*

12 Crump responded to All Risks' substantive position on the requests and asked that
13 responsive documents be produced. *1st Crump Dec, Ex. I at 1-2.* Crump addressed Defendants'
14 concern that responsive documents would include internal communications regarding what
15 salaries All Risks would offered Crump employees:

16 [W]e will move to compel production without any redactions, including
17 information related to the proposed salaries and/or terms of employment for those
18 individuals, and we think that each of the points raised in your letter lacks merit.
19 You state that we do not need information about salaries because McGrath
20 testified that his salary is not based upon revenue generation. However, we are
21 entitled to check the veracity of McGrath's testimony against the documents.
22 You state that the duration of any employment contracts is confidential and
23 proprietary and irrelevant. However, as we have pointed out before and you have
24 not addressed, the parties have already negotiated a protective order governing
25 discovery that is confidential and proprietary and we have offered and hereby
26 offer again to discuss even stricter protection if you think it is necessary. The
27 information is relevant because we need to know what McGrath was attempting to
28 negotiate on behalf of Marty, to establish the extent of McGrath's breach of

1 fiduciary duty owed to Crump.

2 *1st Carp Dec, Ex. I at 1-2.* Further, Crump explained that Defendants' contention that
 3 responsive documents would have "no nexus to McGrath" is irrelevant because "[w]e claim that
 4 Defendants wrongfully interfered with Crump's employment relationships with employees other
 5 than McGrath." *1st Carp Dec, Ex. I at 2.* Later that day, Defendants responded by continuing to
 6 refuse to produce any additional documents, without even addressing RFP No. 4 in any explicit
 7 way whatsoever. *1st Carp Dec, Ex. J.*

8 A party who initiates "multiple communications in an attempt to obtain complete
 9 production" makes efforts that are "more than adequate under the Local Rules." *Sherwood v.*
 10 *Wavecrest Corp.*, 2007 U.S. Dist. LEXIS 8292, *3 (N.D. Cal. January 22, 2007). Given (1)
 11 Crump's repeated attempts to meet and confer, (2) Defendants' repeated refusals to meet and
 12 confer, only eventually to grudgingly participate on a limited basis, and (3) Crump's detailed
 13 explanations why the documents are discoverable in response to Defendants' minimal meet and
 14 confer efforts, Crump more than adequately met and conferred.

15 Citing no authority, Defendants also argue that Crump "began engaging in a scorched
 16 earth approach to meeting and conferring regarding discovery," such as by sending twenty pages
 17 of letters. (All Risks Opp. at 8:1-8.) It is unclear what Defendants are arguing, if anything.
 18 Perhaps the argument is that Crump's communications were too long, but Defendants do not
 19 explain which communications should have been cut, if any, and in any event does not cite
 20 authority that a party who sufficiently meets and confers cannot move to compel if his
 21 communications are too long. Crump reserves the right to respond to any coherent argument
 22 Defendants raise at the hearing on this motion.

23 **2. Crump has not waived its right to move to compel.**

24 Defendants argue that Crump waived its right to move to compel by not moving sooner.
 25 (All Risks Opp. at 6:9-7:2.) Defendants rely on *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620
 26 (D. Nev. 1999), but that case is distinguishable. The motion to compel in *Gault* was filed after
 27 the responding party had moved for summary judgment and 76 days after the close of discovery.
 28 Further, additional discovery on the eve of trial would have caused a delay in proceedings.

1 Here, in contrast, Crump filed this motion before the close of discovery (and Crump filed its
2 second motion immediately after the close of discovery), Defendants have not moved for
3 summary judgment or pointed to any prejudice caused by any perceived delay, and the motion
4 will not require additional discovery on the eve of trial, which will not take place until
5 December 1, or otherwise cause delay in proceedings.

6 Further, Crump's motion is timely under the two cases that *Gault* cites, which involved
7 delays significantly longer than the relatively short time periods in this case. In *Kendrick v.*
8 *Heckler*, 778 F.2d 253, 258 (5th Cir. 1985), the Fifth Circuit held the motion to compel was
9 timely even though it was not filed until *eight months* after the subject deposition was
10 concluded, because, as here, during part of the time the parties were negotiating an informal
11 resolution, the opposing party failed to indicate any prejudice or unnecessary burden, and the
12 motion was filed within the discovery cut-off fixed by the district court. Similarly, in *Byrnes v.*
13 *Jetnet Corp.*, 111 F.R.D. 68, 71 (M.D.N.C. 1986), the court held the motion to compel was
14 timely even though there was a delay of *six months*, because, as here, during part of the time the
15 moving party attempted to resolve the dispute out of court, the opposing party did not point to
16 any prejudice or hardship, and discovery was still continuing.

17 For all of the above reasons, Crump's motion is timely.

18 **3. Defendants' suggestion that Crump has agreed that Defendants need**
19 **not produce any requested documents is false.**

20 Defendants apparently suggest that Crump somehow agreed that they need not produce
21 anything further, using phrases like the parties "previously reached a resolution" (*All Risks 1st*
22 *Opp.* 6:28), and "meet and confer efforts concluded" (*All Risks 1st Opp.* 4:27), and "prior
23 agreements or actions by former counsel [should not] be ignored" (*All Risks 1st Opp.* 5:7). The
24 suggestion is completely false, as Defendants point to nothing indicating that Crump agreed that
25 Defendants need not produce requested documents, and in fact no such agreement exists.

26 **4. Defendants' objections are meritless.**

27 Defendants argue that responsive documents would reveal internal communications
28 regarding what salaries should be offered to third parties to this litigation. *All Risks 1st Opp.* at

1 8:21-25. However, as Crump explained in its Motion, and Defendants ignore, such documents
2 are relevant because they would reveal whether McGrath wrongfully disclosed, and All Risks
3 relied on, confidential Crump information such as Marty's compensation at Crump, and they
4 would also disclose the extent of McGrath's wrongful assistance to All Risks in determining
5 what to offer Marty in order to successfully hire her away from Crump, and whether All Risks
6 relied on that wrongful assistance.

7 Defendants argue that the request has no "nexus" to McGrath and therefore no relation to
8 this lawsuit, and would jeopardize the employment of Crump employees who are negotiating
9 with All Risks. *All Risks 1st Opp.* at 8:24-9:3. Regarding the former concern, Crump alleges
10 that Defendants intentionally and negligently interfered with Crump employees other than
11 Marty, *Complaint*, ¶¶ 66-79, and once the documents have finally been produced, Crump can
12 depose McGrath about them to determine which employees he was interfering with in addition
13 to Marty. Defendants cannot unilaterally claim that McGrath was not involved in recruiting any
14 other employee and on that basis refuse to produce responsive documents. Regarding the latter
15 concern, Crump would work with Defendants to agree to an attorneys' eyes only limitation.

16 All Risks' next argument is very confusing. *All Risks Opp.* at 9:19-27. All Risks first
17 misconstrues Crump's contention, then asserts that the misconstrued contention is disingenuous,
18 and then promises to amend its response to say that it does not have a subset of the requested
19 documents even though All Risks later served an amended response that does not make any such
20 assertion. *3rd Carp Dec, Exs. A-D*. Crump's actual contention is that responsive documents are
21 relevant to whether McGrath wrongfully assisted All Risks in recruiting Marty while he was
22 Crump's Executive Vice President. All Risks offers no coherent explanation as to why this is
23 incorrect. This Court should compel production of all responsive documents.

24 Next, All Risks again promises to serve an amended response to say that it does not have
25 a different subset of documents, and then claims the request is "moot." *All Risks Opp.* at 10:1-
26 20. However, All Risks' amended responses do not make any such assertion, and All Risks
27 cannot avoid production of all responsive documents by claiming that it does not have a certain
28 subset and then arguing the request is moot.

1 Next, All Risks argues that Crump is not entitled to documents regarding All Risks' legal
2 solicitation of any Crump employee regardless of whether McGrath was involved. *All Risks*
3 *Opp.* at 11:4-14. However, as noted above, it is the responsive documents themselves and
4 follow-up deposition with McGrath that will determine McGrath's involvement. All Risks
5 cannot unilaterally declare that McGrath was not involved in one or more solicitations and on
6 that ground refuse to produce any responsive documents, especially when recently revealed
7 documents undermine Defendants' credibility. For example, McGrath testified that he did not
8 give any input to anyone at All Risks as to what it would take to entice Marty to join All Risks
9 (*3rd Carp Dec, Ex. G*), whereas newly un-redacted documents show that this is false. *3rd Carp*
10 *Dec, Ex. E*.

11 Further, even under All Risks' authority, *Reeves v. Hanlon*, 33 Cal.4th 1140, 17
12 Cal.Rptr.3d 289 (2004), whether or not McGrath was involved, if responsive documents show
13 efforts to recruit away numerous or key employees from Crump, they would be relevant and
14 discoverable for two reasons: (1) they may show All Risks' intent to wrongfully interfere with
15 Crump's employees and customers, and (2) they may show malice, oppression, or intent to harm
16 Crump. In *Reeves*, on the evening of defendants' resignations from plaintiffs, defendants
17 solicited plaintiffs' key employees, then offered them jobs, as a result of which plaintiff lost nine
18 employees over the next 60 days, six of them joining defendants' new firm. *Id.* at 1146, 1155.
19 In addition, defendants misappropriated plaintiff's trade secrets and personally solicited
20 plaintiff's clients. *Id.* at 1145. Based on these actions, the Supreme Court affirmed the trial
21 court's finding that defendants intentionally interfered with plaintiff's employees, reasoning
22 that, "while Hanlon and Greene waited until after their resignations to offer jobs to plaintiffs'
23 employees, we cannot conclude the trial court abused its discretion in finding that defendants'
24 unlawful and unethical actions were designed in part to interfere with and disrupt plaintiffs'
25 relationships with their key at-will employees." *Id.* at 1155.

26 Here, McGrath solicited Marty, a key Crump employee, before he resigned from Crump.
27 A jury could conclude that he did so on behalf of All Risks. Further, a jury could conclude that
28 All Risks misappropriated Crump's client list and other confidential information and solicited

1 Crump customers using that list. (Crump's Motion to Compel at 3:10-19, 4:3-9.) Under *Reeves*,
 2 documents showing efforts by All Risks to recruit key or numerous Crump employees, whether
 3 or not McGrath was involved, are relevant to All Risks' intent to interfere with Crump's
 4 employees and customers and to harm Crump. Therefore, all responsive documents should be
 5 produced, whether or not they involve McGrath.¹

6 For these reasons, this Court should compel All Risks to respond fully to RFP No. 4.

7 **B. This Court should compel All Risks to respond fully to RFP Nos. 7 and 26.**

8 **1. Marty's testimony does not defeat Crump's right to the relevant**
 9 **documents.**

10 All Risks seems to argue that Crump is not entitled to documents regarding Marty's
 11 possible employment with All Risks because Marty testified at her deposition that "she was
 12 contacted by Nick Cortezi—not Mike McGrath—and the decision to leave Crump was her
 13 own—influenced by no one else." *All Risks Opp.* at 12:17-23. If this is All Risks' argument, it
 14 fails for two reasons. First and most important, even if Marty did so testify, Crump has the right
 15 to obtain relevant documents to determine the accuracy and veracity of any such testimony,
 16 otherwise any party to litigation could refuse to produce documents, lie about their contents at a
 17 deposition, and defeat the other party's ability to obtain the documents and the truth. Second, in
 18 any event, All Risks does not cite to any page or line numbers for this purported testimony. In
 19 fact, McGrath was negotiating on her behalf with All Risks (ALL000014-15), and Marty told
 20 Peter Scott that McGrath solicited her to leave Crump and join All Risks after McGrath had
 21 joined All Risks. (4/4/08 Scott Depo at 130:5-131:22.) Whatever Marty said at her deposition,
 22 that does not defeat Crump's right to obtain all relevant documents.

23 ¹ All Risks argues that, because "Plaintiff sent a letter to Defendants indicating that it sought to
 24 amend its Complaint in light of additional Crump employees who have moved to All Risks,"
 25 that somehow demonstrates that the request is "clearly a fishing expedition so that Plaintiff can
 26 try and file additional lawsuits against Defendant All Risks that have no relation to McGrath and
 27 thus is clearly an abuse of the discovery process." *All Risks Opp.* at 11:15-21. However, even if
 28 Crump wanted to "try and file" additional lawsuits regarding other employees who have left
 Crump for All Risks, All Risks does not explain why Crump needs this discovery in order to do
 so. Crump could simply file the lawsuits now. Further, as explained above, responsive
 information about All Risks' recruiting of other Crump employees is relevant to All Risks'
 intent to wrongfully interfere with Crump's employees and customers, and to All Risks' malice,
 oppression, and intent to harm Crump. The request seeks only relevant information.

1 **2. All Risks' brief allusion to Marty's right of privacy fails.**

2 All Risks claims that producing responsive documents would "most certainly invade[]
3 Ms. Marty's right to privacy." *All Risks Opp.* at 12:23-24. As with Defendants' other privacy
4 claims, if All Risks is seriously asserting it despite only the brief allusion here, this Court should
5 view the responsive documents *in camera*, with Defendants bearing the burden of assisting the
6 Court with that review.

7 **3. Producing some responsive documents does not entitle All Risks to**
8 **withhold all responsive documents.**

9 All Risks notes that Defendants have already produced ALL000009-15 and ALL000018-
10 21. *All Risks Opp.* at 12:24-26. Nothing in the Rules or case law holds that this partial
11 production entitles All Risks to withhold other responsive documents.

12 **4. All Risks' representation that it does not have a certain subset of**
13 **documents does not defeat All Risks' right to all responsive**
14 **documents.**

15 All Risks "will further represent that it does not have any documents involving McGrath
16 and the possible employment of Marty in its possession, custody, or control." *All Risks Opp.* at
17 12:26-13:2. This "representation" does not defeat Crump's right to obtain all responsive
18 documents, for two reasons. First, the representation is effectively meaningless. What does
19 "documents involving McGrath" mean, exactly? Does it exclude documents that do not mention
20 McGrath by name but contain confidential Crump information about Marty that McGrath
21 disclosed to All Risks? Permitting All Risks to withhold responsive documents on the ground
22 that it represents that it does not have some vague and ambiguous subset of documents would
23 defeat Crump's right to obtain all responsive documents and the truth. Second, even if the
24 representation were clear and meaningful, Crump is entitled to all responsive documents, not
25 merely a representation that All Risks does not have a subset of responsive documents.

26 **C. This Court should either compel production of the documents with redactions**
27 **on the ground of privacy or view them *in camera*.**

28 **1. ALL000006, ALL000007, and ALL000016.**

 All Risks makes the circular argument that Crump is entitled only to see the name of
 Marty, and nothing else, because "Marty was specifically identified by Plaintiff." *All Risks Opp.*

1 at 13:6-8. Of course, All Risks' redaction of responsive information is precisely why Crump
2 cannot "identify" other individuals or information that should not have been redacted.

3 All Risks asserts that "[t]he remaining redacted information is of no relation to this
4 lawsuit." *All Risks Opp.* at 13:8. However, because Crump does not know what the redacted
5 information contains, it cannot challenge the accuracy of All Risks' assertion. This Court
6 should view the documents *in camera* to determine their discoverability, as All Risks suggests.

7 **2. ALL00009-10 and ALL000018-19.**

8 All Risks argues that the only redacted information is "the compensation numbers for
9 Mr. McGrath and Ms. Marty." *All Risks Opp.* at 14:22-24. Crump explained why it needs the
10 information regarding McGrath's and Marty's compensation, which All Risks completely
11 ignores. In sum: (1) Information regarding McGrath's salary will help Crump fashion a remedy
12 for Defendants' misappropriation of trade secrets; (2) Information regarding McGrath's
13 suggestions for what All Risks should offer Marty to hire her away from Crump will disclose the
14 extent of McGrath's impermissible assistance to All Risks in breach of McGrath's fiduciary duty
15 of loyalty. Because All Risks does not even attempt to explain why McGrath's and Marty's
16 alleged right to privacy in the information outweighs Crump's need to know this information,
17 this Court should compel the disclosure.²

18 **D. This Court should compel McGrath, Cortezi and Marty to answer questions**
19 **at further depositions about all documents wrongfully withheld from**
production.

20 All Risks argues that this Court should not compel McGrath, Cortezi and Marty to
21 answer questions about any documents wrongfully withheld from production because "Crump
22 had its opportunity to raise these issues with Court [sic] prior to their scheduled depositions
23 which have now concluded." *All Risks Opp.* at 14:26-15:1. However, All Risks cites no
24

25 ² All Risks relies on an objection from the deposition of Glenn Hargrove as another opportunity
26 to accuse Crump of being "disingenuous." *All Risks Opp.* at 13:25-14:21. Whatever the quote
27 from the Hargrove deposition establishes, if anything, it has nothing to do with whether Crump's
28 need to learn the information in ALL00009-10 and ALL000018-19 outweighs McGrath's and
Marty's alleged privacy right in the information. Because Crump's need to know outweighs any
privacy right in the information, and Defendants do not even attempt to argue otherwise, this
Court should compel the disclosure.

1 authority for the proposition that a party who appears for his deposition without having
 2 complied fully with his discovery obligations thereby defeats the requesting party's ability to
 3 compel compliance, and such a rule would be perverse. Defendants withheld responsive
 4 documents and information at their peril, not at Crump's. They have only themselves to blame
 5 for opening themselves up to further deposition questions about documents they wrongfully
 6 withheld from production.³

7 **II. This Court should grant Crump's Second Motion to Compel.**

8 **A. RFP Nos. 8-12 and 36-37 to All Risks and Nos. 13-17 to McGrath.**

9 **1. Crump has not waived its right to move to compel.**

10 Crump filed its Second Motion to Compel six days after its First Motion to Compel.
 11 Crump's Second Motion is not untimely for the same reasons its First Motion is not untimely.

12 **2. Crump adequately met and conferred; Defendants refused to.**

13 These requests seek information relating to Crump customers that followed McGrath to
 14 All Risks or McGrath's communications with these customers after he joined All Risks. Citing
 15 no authority, Defendants argue that Crump did not sufficiently meet and confer. *All Risks 2d*
 16 *Opp.* at 8:21-9:13. Defendants' argument is meritless. Similar to the pattern described above,
 17 Crump repeatedly tried to meet and confer over these issues, only to be refused by Defendants.
 18 In its request to meet and confer, Crump explained in detail why none of the objections to RFP
 19 No. 2 to All Risks had merit:

20 2. This request seeks documents concerning Crump customers that
 21 went to All Risks, which is the heart of our case. This request is therefore not
 22 overly broad. The Stipulated Protective Order Regarding Confidentiality moots
 23 your objection that the request seeks confidential, proprietary or trade secret

24 ³ All Risks argues that "with regard to Marty, she was never asked about the terms of her
 25 compensation during her deposition," so she cannot now be forced to answer any questions
 26 about documents that discuss her compensation. *All Risks Opp.* at 15:5-8. All Risks cites no
 27 authority for the proposition that a requesting party somehow waives its right to question a
 28 witness about documents wrongfully withheld from production if the requesting party does not
 ask certain questions at a deposition taken before the documents have been produced. Such a
 rule would make no sense. Crump has not waived its right to question Marty about documents
 wrongfully withheld from production.

1 information; if you think you need stricter protection, let us know....

2 *1st Carp Dec, Ex. D* at 1. RFP No. 2 sought all information relating to all Crump customers that
3 followed McGrath to All Risks. RFP Nos. 8-12 to All Risks and 13-17 sought the same
4 information but referred to individual Crump customers by name. Defendants asserted
5 essentially the same objections to each. Thus, Crump explained that the issues were essentially
6 the same for each. *1st Carp Dec, Ex. D* at 1-2.

7 Defendants flatly refused to meet and confer. *1st Carp Dec, Ex. E* at 1-2. Crump again
8 tried to meet and confer over these issues. *1st Carp Dec, Ex. F* at 1-3. Crump's counsel spoke
9 with Defendants' counsel later that day and again, for the third time, tried to meet and confer
10 over these issues, but Defendants refused to meet and confer. *3rd Carp Dec, ¶ 2*.

11 Defendants finally provided a substantive response, which reiterated their objections that
12 the requests are overbroad and seek irrelevant and proprietary information. *1st Carp Dec, Ex. H*
13 at 4-5. Thus, Crump then explained that requests seeking communications between McGrath
14 and Crump customers seek relevant information because they relate to "Plaintiff's allegations
15 that McGrath used confidential Crump information to solicit business on behalf of All Risks."
16 *Declaration of Dylan B. Carp, executed June 24, 2008 ("2nd Carp Dec")*, *Ex. E* at 1. Further,
17 in a separate communication, Crump explained that, "as we have pointed out before and you
18 have not addressed, the parties have already negotiated a protective order governing discovery
19 that is confidential and proprietary, and we have offered and hereby offer again to discuss even
20 stricter protection if you think it is necessary." *1st Carp Dec, Ex. I* at 1. Nevertheless,
21 Defendants stood by their objections. *2nd Carp Dec, Ex. G* at 1.

22 Crump's "multiple communications in an attempt to obtain complete production,"
23 explaining Crump's position in detail but leading only to refusals to meet and confer and then
24 refusals by Defendants to produce, are "more than adequate under the Local Rules." *Sherwood*,
25 2007 U.S. Dist. LEXIS 8292 at *3. Crump explained why the requests are not overbroad, why
26 they seek relevant information, and why responsive documents should be produced under the
27 parties' Stipulated Protective Order notwithstanding any confidentiality or proprietary concern.
28 Crump's explanations during the meet and confer process are the same grounds that Crump

1 asserts in its Motions to Compel. Defendants cite no authority that they may refuse to meet and
 2 confer and then defeat a motion to compel on the ground that Crump inadequately met and
 3 conferred, or that Crump's repeated attempts to meet and confer and repeated explanations why
 4 Defendants' objections are meritless are still not enough to compel complete production.

5 **3. Defendants' objections are meritless.**

6 Regarding the merits of Defendants' objections, Defendants appear to contradict
 7 themselves. Recall that Crump argues that it is entitled to all documents regarding the former
 8 Crump customers at issue because they may reveal confidential Crump information regarding
 9 policy renewal dates, commissions and premiums that McGrath misappropriated from Crump
 10 and used at All Risks. In response, Defendants first assert that Crump is not entitled to the
 11 documents because they contain "confidential information." *All Risks 2d Opp.* at 10:8-12.
 12 Then, Defendants apparently assert that the documents are irrelevant because, even if McGrath
 13 did take such information from Crump and use it to obtain clients at All Risks, that would be
 14 irrelevant because "information allegedly obtained from the lists is also available via other
 15 means." *All Risks 2nd Opp.* at 10:25-26.

16 This Court should not be distracted by Defendants' whipsawing. If the information is
 17 confidential, then it is relevant by All Risks' implicit admission and should be produced under
 18 the parties' Stipulated Protective Order. If it is not confidential, then All Risks has no basis to
 19 oppose its production on the ground that it is confidential. In any event, whether the information
 20 is confidential is for the jury to determine, not for this Court to determine in the context of a
 21 discovery dispute, particularly given that the parties have already agreed on a protective order to
 22 govern production of any confidential or proprietary documents.

23 Next, All Risks offers to represent that it does have a subset of documents. *All Risks*
 24 *2nd Opp.* at 10:26-11:1. However, Crump is entitled to all responsive documents, not a
 25 representation that All Risks does not have a subset of them.

26 Next, All Risks appears to admit that the quote that McGrath obtained from RLI
 27 regarding Alecta when he was at Crump is confidential. *All Risks 2nd Opp.* at 11:2-11. Thus,
 28 all responsive documents should be produced under the parties' Stipulated Protective Order.

1 Again, All Risks offers to state that it does not have a subset of documents. *All Risks 2nd Opp.*
 2 at 11:12-16. However, Crump is entitled to all responsive documents, not a representation that
 3 All Risks does not have a subset of them.

4 Next, All Risks argues that RFP Nos. 36 and 37 are overbroad because responsive
 5 documents “would include negotiations between All Risks and HUB and Woodruff which
 6 includes information beyond the scope of what retailers typically provide to brokers.” *All Risks*
 7 *2nd Opp.* at 13:28-14:3. This appears to be a red herring at best, meaningless at worst. As
 8 explained above, Crump is seeking to learn whether McGrath used confidential Crump
 9 information when he negotiated with these Crump customers after he joined All Risks. All
 10 Risks cannot defeat Crump’s right to learn this information merely by asserting that McGrath’s
 11 negotiations with these customers “includes information beyond the scope of what retailers
 12 typically provide to brokers,” whatever that means. This Court should compel All Risks to
 13 produce all responsive documents so that Crump may learn the truth about whether McGrath
 14 misappropriated Crump’s confidential and trade secret information and used that information to
 15 steal Crump’s clients.

16 **B. Defendants do not even attempt to show that Crump’s right to the truth is**
 17 **outweighed by any privacy right of McGrath’s.**

18 Defendants do not argue, much less demonstrate, that Crump’s right to discover
 19 McGrath’s salary at All Risks is outweighed by any privacy right McGrath has in the
 20 information. Instead, Defendants cite an exchange from Hargrove’s deposition to accuse Crump
 21 of being “disingenuous.” *All Risks 2nd Opp.* at 14:16-15:26. Defendants also appear to argue
 22 that discovery should be blocked on the ground that the information is confidential and
 23 proprietary, but these objections are waived because they were not asserted during the
 24 deposition, and in any event production should occur under the parties’ Stipulated Protective
 25 Order. Defendants also argue that Crump should not be permitted to depose McGrath about his
 26 compensation at All Risks because Crump also moved to produce e-mails that apparently
 27 discuss McGrath’s *proposed* compensation at All Risks, not necessarily his actual compensation.
 28 *All Risks 2nd Opp.* at 16:1-4. However, Defendants do not explain why production of e-mails

1 discussing McGrath's proposed compensation would defeat Crump's right to ask McGrath to
2 testify about his actual compensation under oath.

3 **C. This Court should compel production of all documents listed on Defendants'**
4 **privilege log or view them *in camera* to determine their discoverability.**

5 After first stating that Defendants did not withhold any documents on the ground of the
6 attorney-client privilege or work product doctrine, Defendants then produced a privilege log on
7 June 25 asserting the objections of attorney-client privilege, work product doctrine,
8 confidentiality, proprietary, and privacy. *3rd Carp Dec, Ex. F.*

9 **1. Attorney-client privilege does not apply.**

10 The log reveals that not a single document is protected by the attorney-client privilege.
11 Because California law supplies the rules of decision regarding the claims and defenses in this
12 lawsuit, California law of privilege applies. *Rule 501, Fed. R. Evid.* Under California law, the
13 attorney-client privilege applies only to "information transmitted between a client and his or her
14 lawyer in the course of that relationship...." *Cal. Evid. Code Section 952.* Here, no attorney
15 authored or received any document, so no document is covered by the attorney-client privilege.

16 **2. This Court should compel production of documents for which the**
17 **work product objection is asserted or should view them *in camera* to**
18 **determine their discoverability.**

19 Federal law governs disposition of issues relating to work product immunity in cases in
20 which a federal court exercises diversity jurisdiction. *Employers Ins. of Wausau v. California*
21 *Water Service Co.*, 2007 U.S. Dist. LEXIS 77363, *2 (N.D. Cal. Oct. 9, 2007). Under federal
22 law, "[o]rdinarily, a party may not discover documents and tangible things that are prepared in
23 anticipation of litigation or for trial by or for another party or its representative....," but "those
24 materials may be discovered if...the party shows that it has substantial need for the materials to
25 prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other
26 means." *Rule 26(b)(3)(A)(ii)*, Fed. R. Civ. Pro. Further, "[w]hen a party withholds information
27 otherwise discoverable by claiming that the information is...subject to protection as trial-
28 preparation material, the party must...describe the nature of the documents, communications, or
tangible things not produced or disclosed—and do so in a manner that, without revealing

information itself privileged or protected, will enable other parties to assess the claim.” *Rule 26(b)(5)(A)(ii)*, Fed. R. Civ. Pro.

Here, nothing in Defendants’ privilege log indicates that any of the documents were prepared in anticipation of litigation or for trial by or for Defendants or their representative. Therefore, either the protection does not apply, or Defendants waived the protection by failing to describe adequately why the protection applies. So this Court should compel their production. In the alternative, this Court should view the documents *in camera* to determine whether the protection applies and, if so, whether the documents should be produced under Rule 26(b)(3)(A)(ii).

3. Confidential and proprietary objections are mooted by the parties’ Stipulated Protective Order.

Defendants assert the objections of confidential and proprietary regarding PRIVALL00027-29. This Court should compel production pursuant to the parties’ Stipulated Protective Order, the purpose of which was to facilitate production of such information.

4. This Court should view PRIVALL00027-29 *in camera*.

Defendants assert a privacy objection regarding PRIVALL00027-29. This Court should view those three documents *in camera* to determine their discoverability.

III. CONCLUSION

Defendants wrongfully withheld numerous documents, refused to meet and confer, and now seek to evade responsibility. This Court should grant Crump’s motions in their entirety so that Crump may learn the truth about Defendants’ wrongdoing.

DATED: July 22, 2008

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